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CPLR 203(a): Cause of Action in Strict Products Liability for Drug-Induced Injuries Accrues Upon Injection of Drug

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increased number of cases. Among the seven Court of Appeals decisions examined are *Thornton v. Roosevelt Hospital* and *George v. Mount Sinai Hospital,* both of which substantially effect the law governing limitations of time. In *Thornton,* the Court applied the date-of-introduction accrual rule for foreign substances in a products liability case. The *Thornton* Court used the rule applicable to tort actions generally to the still-evolving theory of strict products liability. Significantly, the Court declined to adopt a discovery rule of accrual even though the resulting injury may not manifest itself until well after the statute of limitations has elapsed. In *George,* the Court ruled that a personal injury action commenced in the name of a deceased plaintiff was not a "nullity," for purposes of CPLR 205. The plaintiff, therefore, was entitled to a 6-month extension of the statute of limitations within which to recommence the action in the name of the proper party plaintiff.

Cohen v. Pearl River School District, one of several important lower court decisions commented upon in *The Survey,* is concerned with the effect of the 1976 amendments to section 50-e of the General Municipal Law. In *Cohen,* the Appellate Division, Second Department, ruled that infancy does not toll the period for which a court may grant leave to file a late notice of claim.

It is hoped that this issue of *The Survey* will continue to further its traditional goal of keeping the New York practitioner informed of significant developments in state practice through thoughtful analysis of recent decisions.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 203(a): Cause of action in strict products liability for drug-induced injuries accrues upon injection of drug

CPLR 203(a) provides that the statute of limitations begins to run when the cause of action accrues.[1] Tort actions generally accrue on the date of the plaintiff's injury.[2] Where the time of exposure to

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Also valuable are the two joint reports of the Senate Finance and Assembly Ways and Means Committee:

1961 N.Y. LEG. DOC. No. 15 ..... FIFTH REP. .028
1962 N.Y. LEG. DOC. No. 8 ..... SIXTH REP. 029

[1] CPLR 203(a) provides that "[t]he time within which an action must be commenced . . . shall be computed from the time the cause of action accrued to the time the claim is interposed." A cause of action accrues when "the plaintiff first [becomes] enabled to maintain the particular action in question." Cary v. Koerner, 200 N.Y. 253, 259, 93 N.E. 979, 982 (1910); *accord,* 1 WK&M ¶¶ 201.02, 203.01; *Developments in the Law — Statutes of Limitations,* 63 HARV. L. REV. 1177, 1200 (1950).

[2] *E.g.,* Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 299-300, 200 N.E. 824,

a deleterious substance and the manifestation of the resulting injury are not contemporaneous, however, the possibility arises that a claim may be time-barred before the plaintiff becomes aware of its existence.[3] Nonetheless, the established rule in New York is that a cause of action for damages caused by substances introduced into the plaintiff's body accrues upon the invasion, regardless of when the injury manifests itself.[4] Recently, in *Thornton v. Roosevelt Hospital*,[5] the Court of Appeals examined the timeliness of a wrongful death action brought approximately 20 years after an allegedly carcinogenic chemical was injected into the decedent and held that the cause of action, pleaded in strict products liability, accrued on the date of the injection.[6]

While a patient at Roosevelt Hospital in 1954, Mrs. Thornton was injected with Thorotrast, a radioactive salt used to facilitate x-ray examinations.[7] Nearly 20 years later, she developed a carcinoma which proved fatal.[8] Within 3 years of the onset of the cancer, her husband brought an action for wrongful death sounding in negligence and breach of warranty against the manufacturer of Thorotrast and the hospital.[9] Special Term dismissed both causes of action as untimely, but granted the plaintiff leave to replead in strict products liability.[10] On appeal, the Appellate Division, First Department, modified the lower court's order by striking the portion granting leave to amend the complaint and, as modified, affirmed the order.[11]

On appeal, the Court of Appeals affirmed the appellate divi-

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827 (1936); 1 WK&M ¶ 214.16.

[3] *See* Estep & Van Dyke, *Radiation Injuries: Statute of Limitations Inadequacies in Tort Cases*, 62 MICH. L. REV. 753, 759-69 (1964); *Developments in the Law — Statutes of Limitations*, 63 HARV. L. REV. 1177, 1200-07 (1950).

[4] Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *cert. denied*, 374 U.S. 808 (1963).

[5] 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979), *aff'g* 59 App. Div. 2d 680, 398 N.Y.S.2d 659 (1st Dep't 1977).

[6] 47 N.Y.2d at 781, 391 N.E.2d at 1003, 417 N.Y.S.2d at 921-22.

[7] *Id.* at 782, 391 N.E.2d at 1003, 417 N.Y.S.2d at 922 (Fuchsberg, J., dissenting). Thorotrast is the manufacturer's trade name for thorium dioxide. *Id.*

[8] *Id.* (Fuchsberg, J., dissenting).

[9] *Id.*, 391 N.E.2d at 1004, 417 N.Y.S.2d at 922 (Fuchsberg, J., dissenting). The plaintiff alleged that both the hospital and the manufacturer knew that Thorotrast was potentially carcinogenic, but never disclosed that fact to the decedent. *Id.* Claiming that the decedent's death was caused by the Thorotrast injection, the plaintiff further asserted that the carcinoma did not come into existence until sometime after 1972, and submitted as evidence the lack of symptoms and the negative results of examinations of the decedent conducted between 1950 and 1972. *Id.*

[10] *Id.*, 391 N.E.2d at 1003, 417 N.Y.S.2d at 922 (Fuchsberg, J., dissenting).

[11] 59 App.Div. 2d 680, 398 N.Y.S.2d 659 (1st Dep't 1977).

sion.[12] In a memorandum opinion,[13] the Court initially noted that the cause of action for strict products liability accrues on the date of the injury, as does any cause of action sounding in tort.[14] The majority observed that it is well-settled in New York that injuries caused by the injection of chemical compounds into the body occur at the time of injection.[15] Since there was a 20-year interval between the time of the invasion of the chemical and the interposition of the claim, the action was found to be time-barred.[16] The Court then

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[12] 47 N.Y.2d at 781, 391 N.E.2d at 1003, 417 N.Y.S.2d at 921.

[13] Chief Judge Cooke and Judges Jasen, Gabrielli, Jones and Wachtler concurred in the majority while Judge Fuchsberg dissented.

[14] 47 N.Y.2d at 781, 391 N.E.2d at 1003, 417 N.Y.S.2d at 921. The majority noted that in Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975), *see* note 35 *infra*, a cause of action in strict products liability was held to accrue on the date of injury. 47 N.Y.2d at 781, 391 N.E.2d at 1003, 417 N.Y.S.2d at 921-22. The *Thornton* Court emphasized that *Victorson* did not alter, expressly or implicitly, the general rule of accrual in tort cases. *Id.*

[15] 47 N.Y.2d at 781, 391 N.E.2d at 1003, 417 N.Y.S.2d at 922 (citing Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *cert. denied*, 374 U.S. 808 (1963)). *Schwartz* was the product of the Court's earlier decision in Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936), a case that was not mentioned by the *Thornton* majority. *Schmidt* involved a plaintiff who developed a lung disease after inhaling dust while employed by the defendant. Several years after his employment had terminated, the plaintiff brought an action in negligence against his former employer. *Id.* at 297, 200 N.E. at 825. Acknowledging that damage was the essence of a negligence claim, the *Schmidt* Court emphasized that "[i]t is only the *injury* to person or property arising from negligence which constitutes an invasion of a personal right, protected by law, and, therefore, an actionable wrong." *Id.* at 300, 200 N.E. at 827 (emphasis in original). According to the *Schmidt* Court, the injury occurred when the wrongful invasion took place. *Id.* Therefore, the Court concluded that the plaintiff's injury occurred when he had inhaled the dust. *Id.* at 301, 200 N.E. at 827. This result seems inconsistent with the Court's earlier statement that a cause of action can accrue only when the alleged negligence "produce[s] injury," *id.* at 300, 200 N.E. at 827, since any other rule might result in a cause of action being "barred before liability arose," *id. See also* note 24 and accompanying text *infra*.

In *Schwartz*, the plaintiff developed cancer from a substance manufactured by the defendant that had been injected into his body some 13 years earlier. 12 N.Y.2d at 215, 188 N.E.2d at 143, 237 N.Y.S.2d at 715. The majority, following *Schmidt*, ruled that the injury occurred, and the cause of action accrued, at the time of the injection. *Id.* at 217, 188 N.E.2d at 144, 237 N.Y.S.2d at 717. Noting that one of the damages recoverable in a negligence action is harm to the "structure of the body," the Court questioned whether a cause of action can exist before such damage occurs. Nevertheless, relying on *Schmidt*, the Court found that the injury to the body takes place at the time of the initial exposure to the deleterious substance. *Id.* In a dissenting opinion, Chief Judge Desmond noted that, if the carcinogenic properties of the injection were not readily discoverable until some future time, "it would be unreasonable and perhaps unconstitutional" to bar his suit before he possibly could learn of the wrong. *Id.* at 219, 188 N.E.2d at 146, 237 N.Y.S.2d at 719. (Desmond, C.J., dissenting). The majority's adherence to *Schmidt* has been criticized in that its concern for repose overlooks the injustice of barring a claim before its existence has become known. *See* 27 ALB. L. REV. 315 (1963).

[16] 47 N.Y.2d at 781, 391 N.E.2d at 1003, 417 N.Y.S.2d at 922.

considered whether it should extend the "discovery" rule[17] to embrace initially undetectable injuries caused by latent defects in ingested substances.[18] Although the legislature sanctioned the application of the discovery rule in medical malpractice cases "based upon the discovery of a foreign object in the body of the patient,"[19] the Court observed that CPLR 214-a expressly excludes chemical compounds from classification as foreign objects.[20] Accordingly, the majority refused to extend the discovery rule to strict products liability actions involving chemical compounds.[21]

Dissenting vigorously,[22] Judge Fuchsberg asserted that in view of the prevalence of drugs with a potential for long-term injurious effects, an injured plaintiff should "not be foreclosed from having his day in court before he even has knowledge of any injury and certainly not before any injury has occurred."[23] In light of the many

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[17] *Id.* In certain limited circumstances, the statute of limitations does not begin to run until the time of discovery. *See generally* SIEGEL § 43 (1978). For example, the statute of limitations in a fraud case is either 6 years from the commission of the fraud, or 2 years from the date the plaintiff discovered or reasonably could have discovered the fraud, whichever is longer. CPLR 203(f) (Supp. 1979-1980); SIEGEL § 43 (1978).

[18] 47 N.Y.2d at 781, 391 N.E.2d at 1003, 417 N.Y.S.2d at 922.

[19] CPLR 214-a. The statutory provision was enacted after the Court of Appeals had adopted the foreign object discovery rule in Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969). *Flanagan* involved a plaintiff who underwent surgery in 1958. After attacks of pain in 1966, it was discovered that surgical clamps had been left in her abdomen. *Id.* at 428, 248 N.E.2d at 871, 301 N.Y.S.2d at 24. In the plaintiff's suit for negligence, commenced in 1966, the defendant contended that the action was time-barred because the negligent act had occurred 8 years earlier. The Court dismissed this argument, holding that where a foreign object has been left within the body, the statute of limitations does not run until the date the plaintiff reasonably could have discovered the malpractice. *Id.* at 431, 248 N.E.2d at 873, 301 N.Y.S.2d at 27.

[20] 47 N.Y.2d at 781, 391 N.E.2d at 1003, 417 N.Y.S.2d at 922. CPLR 214-a provides in pertinent part:

> [W]here the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . . . For the purpose of this section the term "foreign object" shall not include a chemical compound, fixation device or prosthetic aid or device.

CPLR 214-a (Supp. 1979-1980).

[21] 47 N.Y.2d at 781, 391 N.E.2d at 1003, 417 N.Y.S.2d at 922. The Court maintained that the matter was more appropriate for legislative redress. *Id.*

[22] *Id.* at 782-85, 391 N.E.2d at 1003-06, 417 N.Y.S.2d at 922-24.

[23] *Id.* at 783-84, 391 N.E.2d at 1004, 417 N.Y.S.2d at 923. (Fuchsberg, J., dissenting). Judge Fuchsberg indicated that the cause of action could have accrued at three points: 1) on the date the compound was injected, 2) the date the debilitating process actually began on the decedent's body, regardless of her awareness of it, or 3) the date when the disease first became sufficiently evident to indicate to the deceased that an injury had occurred. *Id.* Either of the latter two dates, he asserted, would mandate a trial inasmuch as the action would not

advances made in modern products liability law,[24] Judge Fuchsberg opined that the common-law rule of accrual on the date of ingestion[25] was outmoded and should be overruled.[26] Additionally, he posited that the policy considerations that led to granting infants additional time in which to commence actions may be less compelling than those that exist in the case of a drug-injured plaintiff.[27] Finally, Judge Fuchsberg characterized the majority's deferral to the legislature to correct an unjust rule of common law as an "abdication of [the Court's] role in the scheme of government."[28]

While it cannot be gainsaid that *Thornton* is consistent with prior law,[29] it is suggested that the rigid accrual rule applied by the majority should be reexamined in light of the underlying purposes of the statute of limitations and the recent developments in products liability law. The justification for protecting defendants against stale claims rests in part upon the assumption that the diligent plaintiff is aware or reasonably can ascertain that he has a cause of action.[30] When reasons other than lack of diligence render timely suit impracticable, however, concern for the defendant must be weighed against the possibility of denying the plaintiff a remedy.[31] These considerations contributed greatly to the development

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be necessarily time-barred. *Id.* Additionally, the dissent noted that several courts had adopted a discovery rule in situations involving substances with deleterious characteristics. *Id.*

[24] *Id.* at 784, 391 N.E.2d at 1005, 417 N.Y.S.2d at 924 (Fuchsberg, J., dissenting).

[25] *See* Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *cert. denied*, 374 U.S. 808 (1963); Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936); note 4 and accompanying text *supra*.

[26] 47 N.Y.2d at 785, 391 N.E.2d at 1005, 417 N.Y.S.2d at 924 (Fuchsberg, J., dissenting).

[27] *Id.* at 785, 391 N.E.2d at 1005, 417 N.Y.S.2d at 924 (Fuchsberg, J., dissenting); *see* CPLR 208 (Supp. 1979-1980). Under CPLR 208, any statute of limitations of less than 3 years is tolled during the plaintiff's infancy. Where the statute of limitations is 3 years or more, CPLR 208 gives the plaintiff 3 years after he reaches majority to commence his action, provided the applicable limitation period does not expire more than 3 years after the infancy disability ends. In medical malpractice cases, CPLR 208 may not operate to extend the limitation period beyond 10 years of the accrual of the cause of action. *Id.*

[28] 47 N.Y.2d at 785, 391 N.E.2d at 1006, 417 N.Y.S.2d at 924 (Fuchsberg, J., dissenting).

[29] *See* Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *cert. denied*, 374 U.S. 808 (1963); Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936); note 4 and accompanying text *supra*.

[30] *See generally* Urie v. Thompson, 337 U.S. 163, 170 (1949); Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 430-32, 248 N.E.2d 871, 872-74, 301 N.Y.S.2d 23, 26-27 (1969). If the injury should have been apparent to a party exercising ordinary care, the plaintiff's ignorance of his cause of action should not prevent the statutory time period from starting to run. *See Developments in the Law — Statutes of Limitations*, 63 HARV. L. REV. 1177, 1203-04 (1950).

[31] *See* Estep & Van Dyke, *Radiation Injuries: Statute of Limitations Inadequacies in Tort Cases*, 62 MICH. L. REV. 753, 766 (1964); Phillips, *An Analysis of Proposed Reform of*

of the law of products liability.[32] Prior to the recognition of a tort action in strict products liability, the New York courts held that the statute of limitations on claims for damages caused by defective products began to run on the date of the sale.[33] After adopting the strict products liability in tort theory,[34] however, the Court of Appeals declared that the limitation period would not commence until the date of injury.[35] Notwithstanding that the date-of-injury rule

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Products Liability Statutes of Limitations, 56 N.C.L. REV. 663, 675 (1978); *Developments in the Law — Statutes of Limitations*, 63 HARV. L. REV. 1177, 1203-05 (1950). The Supreme Court has indicated that allowing the period of limitations to expire as a consequence of a plaintiff's "blameless ignorance" would be inconsistent "with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after *notice* of the invasion of legal rights." Urie v. Thompson, 337 U.S. 163, 170 (1949) (emphasis added); *accord*, Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 429-32, 248 N.E.2d 871, 872-74, 301 N.Y.S.2d 23, 25-28 (1969). *See generally* note 19 *supra*.

[32] *See generally* Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975).

[33] The rule was enunciated by the Court of Appeals in Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 344, 253 N.E.2d 207, 209, 305 N.Y.S.2d 490, 493 (1969). The defendant in *Mendel* installed eight glass doors in 1958, one of which allegedly struck and injured the plaintiff in 1965. *Id.* at 341-42, 253 N.E.2d at 208, 305 N.Y.S.2d at 491. The plaintiff sought to recover for her injuries, alleging causes of action in negligence and breach of implied warranty of fitness for a particular use. *Id.* at 342, 253 N.E.2d at 208, 305 N.Y.S.2d at 491. A closely-divided Court of Appeals held that the statute of limitations in an action "for personal injuries arising from a breach of warranty . . . is six years from the time the sale was consummated." *Id.* at 344, 253 N.E.2d at 209, 305 N.Y.S.2d at 493 (citing CPLR 213(2)). The pre-Code 6-year statute of limitations was found to be applicable in *Mendel* because the glass doors were sold prior to the adoption of the Uniform Commercial Code. 25 N.Y.2d at 345, 253 N.E.2d at 209, 305 N.Y.S.2d at 493; *see* N.Y.U.C.C. § 2-725 (McKinney 1964). Opining that defects in a product often are the natural results of age and use, *see* 25 N.Y.2d at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495, the Court stated that it was

> willing to sacrifice the small percentage of meritorious claims that might arise after the statutory period has run in order to prevent the many unfounded suits that would be brought against manufacturers ad infinitum.

Id. Dissenting, Judge Breitel noted that as a result of the majority's decision, the injured party's claim was time-barred "before [she] ever had one." *See id.*, 253 N.E.2d at 211, 305 N.Y.S.2d at 495 (Breitel, J., dissenting). Judge Breitel maintained that, since a cause of action in strict products liability sounded in tort, not contract, the contract limitation period was inapplicable. *Id.* at 350-53, 253 N.E.2d at 213-15, 305 N.Y.S.2d at 499-501 (Breitel, J., dissenting). Criticized by the commentators, *see Symposium — Mendel v. Pittsburgh Plate Glass Company*, 45 ST. JOHN'S L. REV. 62 (1970), the *Mendel* decision later expressly was overruled by the Court in Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 400, 335 N.E.2d 275, 276, 373 N.Y.S.2d 39, 40 (1975); *see* note 35 *infra*.

[34] Codling v. Paglia, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628-29, 345 N.Y.S.2d 461, 469-70 (1973).

[35] Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 399, 335 N.E.2d 275, 276, 373 N.Y.S.2d 39, 40 (1975). *Victorson* involved three cases in which claims were asserted against the manufacturers of allegedly defective products by users who were not in privity with the defendants. 37 N.Y.2d at 400, 335 N.E.2d at 276-77, 373 N.Y.S.2d at 41. The Court noted that, although injuries sustained from an allegedly defective product could yield only a single claim, the claim could be grounded in one of several theories of liability. *Id.* Expressly

achieves neither repose nor protection against stale claims where a defective product causes injury many years after it has been put into the stream of commerce, the doctrine has been justified by considerations of fairness to the plaintiff.[36]

It is submitted that the *Thornton* Court's ruling that the plaintiff's claim was time-barred before the carcinoma became apparent conflicts with the rationale behind the current state of products liability law.[37] The date-of-injury accrual doctrine was adopted for strict products liability cases in order to prevent a plaintiff from being denied a cause of action before he suffers any injury.[38] Similarly, it is suggested that where the invasion of the plaintiff's rights is of an inherently unknowable nature, such as in the case of an injection of a latently defective drug, the statute of limitations should not start to run until the injured party reasonably can ascertain that he has a cause of action.[39] Until such a rule is recognized,

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overruling *Mendel, see* note 33 *supra,* the *Victorson* Court held that, since actions brought in strict products liability were grounded in tort, 37 N.Y.2d at 402, 335 N.E.2d at 278, 373 N.Y.S.2d at 43, they were governed by the 3-year tort statute of limitations, which starts to run on the date of the injury. *Id.* at 399-400, 335 N.E.2d at 276, 373 N.Y.S.2d at 40. The Court noted that it "would defy both logic and experience" to hold that a cause of action in strict products liability accrued before an injury is sustained. *Id.* at 403, 335 N.E.2d at 278, 373 N.Y.S.2d at 43. The *Victorson* decision has been hailed for its elimination of the confusion surrounding the appropriate statutory limitation period that followed *Mendel. See* Note, *Statute of Limitation On Strict Products Liability Actions in New York,* 40 ALB. L. REV. 869 (1976). *See generally The Survey,* 50 ST. JOHN'S L. REV. 179, 181 (1975).

[36] Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 403, 335 N.E.2d 275, 279, 373 N.Y.S.2d 39, 44 (quoting Caffaro v. Trayna, 35 N.Y.2d 245, 250, 319 N.E.2d 174, 176, 360 N.Y.S.2d 847, 850-51 (1974)). *See generally* Note, *Statute of Limitation On Strict Products Liability Actions in New York,* 40 ALB. L. REV. 869, 883 (1976).

[37] It is suggested that the *Thornton* holding employs a rationale paralleling that employed in the now-defunct *Mendel* decision and runs contrary to the spirit of *Victorson. See* Birnbaum & Rheingold, *Torts,* 28 SYRACUSE L. REV. 525, 544 (1977). *See generally* notes 33 & 35 *supra.*

The rule of accrual at the time of initial exposure has been criticized as barring just claims that are capable of being proved simply because the injury evidenced itself too late. *See* Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations,* 56 N.C.L. REV. 663, 675 (1978). In addition, it has been questioned whether any injury has occurred at the time of the initial exposure. *See* Birnbaum & Rheingold, *Torts,* 28 SYRACUSE L. REV. 525, 544 (1977). It has also been suggested that the rule could serve to "encourage commercial irresponsibility on the part of manufacturers." Birnbaum, *"First Breath's" Last Gasp: The Discovery Rule in Products Liability Cases,* 13 FORUM 279, 285 (1977).

[38] *See* Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 403, 335 N.E.2d 275, 278, 373 N.Y.S.2d 39, 43 (1975); note 35 and accompanying text *supra.*

[39] *See Developments in the Law — Statutes of Limitations,* 63 HARV. L. REV. 1177, 1207 (1950). Using this approach, the date of the manifestation of the injury would be the time of accrual, rather than the date the defendant's wrongful conduct occurred. *Id.* The theory has been employed by courts of other jurisdictions. For example, in Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155 (8th Cir. 1975), the court held that a cause of action for asbestos

however, it appears that a sizeable group of products liability plaintiffs will be left without redress.[40]

Peter McNamara

CPLR 205(a): 6-month extension available where prior personal injury action improperly brought in name of deceased plaintiff was voluntarily discontinued without prejudice to plaintiff's right to commence an action under CPLR 205(a)

When a timely commenced action terminates after the expiration of the statute of limitations, CPLR 205(a) provides a 6-month extension from the time of termination to commence a new action.[41]

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poisoning does not accrue until the disease manifests itself. *Id.* at 160-61. Similarly, in Brush Beryllium Co. v. Meckley, 284 F.2d 797 (6th Cir. 1960), a case involving exposure to pollutants, the cause of action was held to accrue at the time the plaintiff became aware of his injury. One court has held that, for the statute of limitations to begin to run, the plaintiff must have knowledge of the relationship between the offense and the damages sustained. *See* R.J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776 (5th Cir. 1963). The second circuit has held that the plaintiff's awareness of the presence of his injury is a prerequisite to the commencement of the statutory period. *See* Ricciuti v. Voltarc Tubes, Inc., 277 F.2d 809 (2d Cir. 1960).

At least one state appears to have avoided the time of accrual controversy by statutory enactment. MO. ANN. STAT. § 516.100 (Vernon 1952).

A lower New York court recently attempted to avoid the harshness of the injury-at-initial-exposure doctrine. In McKee v. Johns-Manville Corp., 94 Misc. 2d 327, 404 N.Y.S.2d 814 (Sup. Ct. Erie County 1978), a case involving injury from exposure to asbestos, the court held that the cause of action in strict products liability began to run on the date the injury was diagnosed. In light of *Thornton*, however, it is unlikely that the *McKee* holding will be sustained on appeal. *See* Farrell, *Civil Practice — 1978 Survey of New York Law*, 30 SYRACUSE L. REV. 385, 403-04 (1979).

[40] While the *Thornton* rule presumably allows recovery for reasonably anticipated consequential damages, *see* Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 300-01, 200 N.E. 824, 827 (1936); note 15 and accompanying text *supra*, it ignores those cases where injuries are unforeseeable at the time of ingestion. For example, the accrual-on-the-date-of-exposure doctrine would bar the majority of claims for damages caused by radiation exposure, since injury in such cases typically becomes apparent long after the initial exposure. *See* Estep & Van Dyke, *Radiation Injuries: Statute of Limitations Inadequacies in Tort Cases*, 62 MICH. L. REV. 753, 758-61 (1964).

[41] CPLR 205(a) provides:

> (a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or if he dies, and the cause of action survives, his executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action.

CPLR 205(a) (Supp. 1979-1980).